INDEX.

PAGE

Notice of Motion for Writ 1

Petition for Writ of Certiorari 3

Certificate of Counsel for Writ 10

Brief for Petitioners 11

I. For the reasons which led to the granting of a writ of certiorari in *McNeir* v. *Anderson*, we urge that a similar writ be granted in this case 13

II. The gift tax constitutes a deprivation of liberty and property without due process of law in violation of the inhibition of the Fifth Amendment to the Constitution of the United States. This tax relates solely to a gift *inter vivos*, and is imposed solely upon the donor 13

III. In view of the importance of the constitutional question sought to be presented, it is respectfully prayed that the petition for a writ of certiorari be granted 16

TABLE OF CASES, ETC., CITED.

Acts.

PAGE

Revenue Act of 1924, Secs. 319-324, re Gift Tax.....4, 16
Revenue Act of 1913, re Federal Income and Estate Tax Law 15
Revenue Act of 1916, re Federal Income and Estate Tax Law 15
Revenue Act of 1917, re Federal Income and Estate Tax Law 15
Revenue Act of 1918, re Federal Income and Estate Tax Law 15
Revenue Act of 1921, re Federal Income and Estate Tax Law 15
Revenue Act of 1924, re Federal Income and Estate Tax Law 15
Revenue Act of 1916, Sec. 202b, re Federal Inheritance Tax Law..... 15
Revenue Act of 1919, Sec. 402c, re Federal Inheritance Tax 15
Revenue Act of 1921, Sec. 402c, re Federal Inheritance Tax 16
Revenue Act of 1924, Sec. 302c, re Federal Inheritance Tax 16

Cases Cited.

Blackstone v. Miller, 188 U. S. 189, 205..... 15
Blodgett v. Holden, Docket No. 779, U. S. Supreme Court 8, 12

PAGE

Chicago etc. R. Co. v. Englewood Connecting R. Co., 115 Ill. 375, 385 13

Child Labor Tax Case, 259 U. S. 20 16

Dickinson v. People, 168 Ill. 179, 180; 48 N. E. Rep. 108; 39 L. R. A. 116 13

Eastern v. Boston etc. R. R. Co., 51 N. H. 504 14

Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308, 321 13

Hill v. Wallace, 259 U. S. 44 16

Janes v. Omaha Street R. Co., 53 Neb. 631, 653 14

Knowlton v. Moore, 178 U. S. 41 15

McNeir v. Anderson, Docket No. 966, U. S. Supreme Court 5, 8, 12

People ex rel. Manhattan Savings Inst. v. Otis, 90 N. Y. 48, 52 13

Sherman v. Elder, 24 N. Y. 381, 384 13

Smith v. Campbell, 10 N. C. 595, 597 14

Wynehamer v. People, 13 N. Y. 378, 379 13

NOTICE OF APPLICATION FOR WRIT OF CERTIORARI TO BE DIRECTED TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

Supreme Court of the United States

OCTOBER TERM, 1926.

No.

FANNIE E. UNTERMYER as Executrix and EDWARD D. UNTERMYER as Executor of the Last Will and Testament of Isaac Untermyer, deceased,

Petitioners,

against

CHARLES W. ANDERSON, as Collector of Internal Revenue of the United States of America for the Third District of New York,

Respondent.

Sirs:

PLEASE TAKE NOTICE that upon the annexed petition of Fannie E. Untermyer as Executrix and Edward D. Untermyer as Executor of the Last Will and Testament of Isaac Untermyer, deceased, and a certified copy of the entire transcript of the record of this cause herewith

submitted, and also the brief of the petitioners hereto annexed, also to be submitted on the presentation of the petition, an application will be made to the Supreme Court of the United States for a writ of certiorari to be directed to the United States Circuit Court of Appeals for the Second Circuit, wherein the record is now lodged, to review the determination of said Court rendered on April 12, 1927, which affirmed the judgment of the United States District Court rendered March 22, 1927, dismissing the complaint.

Dated, New York, April 14, 1927.

Yours, etc.,

LOUIS MARSHALL,
Solicitor and Counsel for Petitioners,
Office and Post Office Address,
No. 120 Broadway,
Borough of Manhattan,
City of New York.

To:

CHARLES H. TUTTLE, Esq.,
United States Attorney for the
Southern District of New York,
United States Post Office Building,
(Manhattan) City of New York.

Hon. JOHN G. SARGENT,
Attorney General of the United States,
Washington, D. C.

PETITION OF PLAINTIFFS-IN-ERROR FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No.

FANNIE E. UNTERMYER as Executrix and EDWARD D. UNTERMYER as Executor of the Last Will and Testament of Isaac Untermyer, deceased,
Petitioners,

against

CHARLES W. ANDERSON, as Collector of Internal Revenue of the United States of America for the Third District of New York,
Respondent.

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, Fannie E. Untermyer as Executrix and Edward D. Untermyer as Executor of the Last Will and Testament of Isaac Untermyer, deceased, late a citizen of the United States and a resident of the City of New

York, County and State of New York, pray for a writ of certiorari to review the determination by the United States Circuit Court of Appeals for the Second Circuit, whereby the judgment of the District Court for the Southern District of New York, rendered herein on March 22, 1927, was affirmed, on the ground that such determination and the matter in controversy arise under and involve the construction of the Constitution of the United States and the laws of the United States.

And the petitioners respectfully show:

FIRST: They are and each of them is a resident of the City, County and State of New York, within the judicial district of the District Court of the United States for the Southern District of New York.

SECOND: In November, 1925, Isaac Untermyer, their testator, commenced an action in the said District Court against the above-named respondent to recover the amount of a tax he paid (under protest) to him as Collector of Internal Revenue of the United States for the Third District of New York on an asserted claim that such amount was due and payable to the United States of America as a tax under Sections 319 to 324 of the Revenue Act of Congress of 1924 on gifts which he had made during the year 1924. The respondent appeared and interposed an answer which admitted all of the allegations of fact set forth in the complaint.

THIRD: On August 31, 1925, Isaac Untermyer died and the petitioners were duly respectively appointed executrix and executor of his last will and testament, and by an order made by the said District Court the action was revived in their behalf.

FOURTH: The cause was tried in the said District Court before Honorable Francis A. Winslow, District Judge, and a jury, on March 18, 1927, and resulted in the direction of a verdict in favor of the respondent and against the petitioners. On March 22, 1927, a judgment was entered in the District Court dismissing the complaint upon the merits with costs in favor of the respondent.

FIFTH: The petitioners then sued out a writ of error to the United States Circuit Court of Appeals for the Second Circuit, assigning as error that the judgment so rendered was contrary to law, in that the Gift Tax Law as embodied in the Revenue Act of 1924 was unconstitutional and violative of the Constitution of the United States, for reasons set forth in paragraph Eighth hereof, and did not apply to the gift which the petitioners' testator had made prior to the adoption of the provisions of the Gift Tax Law, which became effective on June 2, 1924, after the making of the gift. On April 12, 1927, the United States Circuit Court of Appeals for the Second Circuit rendered its decision affirming the judgment of the United States District Court for the Southern District of New York on the authority of its decision in *McNeir* v. *Anderson, Collector,* rendered on January 10, 1927, which held that the Gift Tax Law was not unconstitutional. That case is now before this Honorable Court for review upon a writ of certiorari recently allowed. On April 13, 1927, the said United States Circuit Court of Appeals issued its order in this acton for a mandate for the affirmance of said judgment.

SIXTH: The material facts in the case are that on or about May 23, 1924, Isaac Untermyer made *inter vivos* a gift to his son, Edward D. Untermyer, of 5,000 shares of the capital stock of the Kennecott Copper Corporation, which, as of the date of the gift, had a fair market value

of $192,500, and that thereupon a tax was imposed on the testator upon the value of the property which was the subject of such gift, pursuant to the provisions of Sections 319 to 324 of the Act of Congress of June 2, 1924, which tax was paid under protest; whereupon the testator filed with the respondent a claim for the refund of such tax payment, and on or about August 3, 1925, the Commissioner of Internal Revenue of the Treasury Department rejected said claim.

SEVENTH: A certified transcript of the record of the case accompanies this petition.

EIGHTH: Your petitioners are advised by their counsel and believe that this case presents the following questions which, because of their great importance, should be passed upon by this Court:

1. Whether the provisions of Sections 319, 320 *et seq.* of the Revenue Act of 1924 imposing a tax on gifts are unconstitutional as violative of the Fifth Amendment of the Constitution of the United States, because

(a) they deprived the plaintiffs' testator of his property, without due process of law;

(b) they deprived the plaintiffs' testator of the liberty of disposing of his property, without due process of law;

(c) they deprived the plaintiffs' testator of one of the essential attributes of his property—the right to dispose of it in accordance with his own free will and unhampered by the imposition of a tax on the exercise of that right;

(d) they were in legal effect the equivalent of a prohibition against the making of a gift and

an impairment of the right of disposition by gift, by reason of the imposition of restrictive conditions upon the exercise of such right;

(e) the tax imposed upon plaintiffs' testator was in effect one upon the exercise of a fundamental right incident to the ownership of property, namely, the right to make a gift, the exercise of such right not being a privilege derived from any statutory authority or governmental license or consent; and

(f) the tax imposed because of the making of the gift is not predicated upon a valid exercise of the taxing power vested in Congress, the imposition of such a tax being *pro tanto* an act of confiscation of the testator's property.

2. Whether the provisions of Sections 319, 320 *et seq.* of the Revenue Act of 1924 imposing a tax on gifts are null and void on the ground that the imposition of such a tax constitutes a violation of the Fifth Amendment of the Constitution of the United States, in that Congress did not have the right, power or authority to levy or assess any tax upon an executed gift made *inter vivos*, and the gift here in question was concededly such a gift, and not a gift *causa mortis*.

3. Whether the provisions of Sections 319, 320 *et seq.* of the Revenue Act of 1924 imposing a tax on gifts constituted a direct tax which was not laid in proportion to a census and enumeration, as required by Article I, Section 9, subdivision 4, of the Constitution of the United States.

4. Whether the provisions of Sections 319, 320 *et seq.* of the Revenue Act of 1924 imposing a tax on gifts were or were not legally retroactive so as to apply to a gift which the plaintiffs' testator had made prior to the passage of the Act.

NINTH: Your petitioners are advised that two cases are now pending in this Honorable Court which involve questions similar to those above set forth as involved herein, viz., *McNeir* v. *Anderson,* which is No. 966 on the docket of the present term, in which a writ of certiorari has been recently allowed, and *Blodgett* v. *Holden,* which is No. 779 on the docket of the present term, in which questions have been certified for decision by the Circuit Court of Appeals for the Sixth Circuit and which has recently been advanced for argument at the beginning of the October, 1927, term of this Court. It is desirable that this case be reviewed by this Honorable Court in conjunction with and at the same time as the *McNeir* and *Blodgett* cases, especially since the petitioners are advised by their counsel that this case more fully raises the questions arising under the Fifth Amendment to the Constitution of the United States than do either of the two cases now pending in this Court.

TENTH: In support of their contentions, the petitioners refer to the annexed brief, which is made a part hereof.

WHEREFORE, your petitioners pray that a writ of certiorari may issue out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify to this Court for review and determination, as provided in the Act of Congress known as the Judicial Code, and that your petitioners have such further relief

in the premises as to this Court may seem appropriate and in conformity with said Act.

And your petitioners will ever pray, etc.

Dated, April 14, 1927.

FANNIE E. UNTERMYER, as Executrix
and
EDWARD D. UNTERMYER, as Executor
under the Last Will and Testament
of Isaac Untermyer, deceased,

by LOUIS MARSHALL,
their Solicitor and Counsel.

LOUIS MARSHALL,
Solicitor and Counsel for Petitioners,
120 Broadway,
New York, N. Y.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

LOUIS MARSHALL, being duly sworn, says:

I am solicitor and counsel for Fannie E. Untermyer as Executrix and Edward D. Untermyer as Executor under the Last Will and Testament of Isaac Untermyer, deceased, the above-named petitioners. I have read over the foregoing petition and know the contents thereof and the facts as stated therein are true to the best of my knowledge, information and belief.

LOUIS MARSHALL.

Subscribed and sworn to before me
this 14th day of April, 1927.

RAPHAEL BRILL,
Notary Public No. 324,
New York County.
(Seal) Commission expires Mar. 30, 1928.

Certificate of Counsel.

I HEREBY CERTIFY that in my opinion the foregoing petition for a writ of certiorari is well founded in law.

LOUIS MARSHALL,
Solicitor and Counsel for Petitioners.